

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

ROY EDWARD ATES, JR.,)	
)	
Plaintiff,)	
)	
v.)	No. 2:21-cv-00418-JPH-MG
)	
UNITED STATES OF AMERICA,)	
)	
Defendant.)	

ORDER ON PENDING MOTIONS

Plaintiff Roy Ates—an inmate incarcerated at the Federal Correctional Institution in Terre Haute, Indiana ("FCI Terre Haute")—is pursuing gross negligence claims against the United States under the Federal Tort Claims Act. Dkt. 43 (order on motion to dismiss). He has filed multiple motions, which the Court resolves in this Order.

I. Motion for Judicial Notice

Mr. Ates asks the Court to take judicial notice that FCI Terre Haute rarely operates on a "regular" schedule. Dkt. 80. He contends that this information is relevant to his pending motion for assistance with recruiting counsel because facility-wide restrictions make it difficult for him to perform legal research and litigate this case. *Id.* The motion, dkt. [80], is **granted** to the extent that the Court will consider Mr. Ates's arguments about schedule restrictions in considering his motion for assistance with recruiting counsel.

II. Motion for Appointment of Counsel

Mr. Ates has filed a motion for assistance recruiting counsel. Dkt. 39. Because Mr. Ates alleged that he needed counsel in part because the law library at FCI Terre Haute lacked materials for researching state law, the Court ordered the United States to respond to the motion. It responded by providing a declaration from the Educational Supervisor at the Federal Correctional Complex ("FCC") in Terre Haute detailing the legal research materials available to inmates at FCI Terre Haute through an Electronic Law Library ("ELL"). Dkts. 44, 44-1. The United States concedes that state case law and other state legal materials are not included in the publications that the Bureau of Prisons ("BOP") provides to inmates through the ELL, but contends that the inmates nonetheless have adequate means to access state law research materials. Specifically, inmates may order books through inter-library loan services, review federal caselaw that cites to and summarizes Indiana state law, submit written requests to prison staff for paper copies of specific Indiana cases or statutes, or solicit assistance from the Indiana University Maurer School of Law Inmate Legal Assistance Program ("ILAP"). Dkt. 44 at 2. The United States also attached a complete copy of the Indiana COVID-19 Immunity Statute, Ind. Code § 34-30-3—which is at issue in this litigation—appended with all citing references available on Westlaw. Dkt. 44-2. The United States also noted that, to the extent that Mr. Ates wants access to the legislative history of the COVID-19 Immunity Statute, there generally is no legislative history for statutes in Indiana. *Id.*

In reply, Mr. Ates contends that the declaration of the FCC Terre Haute Educational Supervisor contained misstatements. Dkt. 53. Specifically, FCC Terre Haute has not offered any interlibrary loan services for at least five years; "scouring" federal cases for references or summaries of Indiana law is not sufficient because no federal cases have discussed the COVID-19 Immunity Statute; staff at FCC Terre Haute are not amenable to requests for state law; although the Maurer ILAP is technically available, requesting assistance is a lengthy process and requires an inmate to know what he wants to ask for; and last the Educational Supervisor misrepresented the availability of the main law library at FCC Terre Haute, noting that the actual schedule is much more restrictive. *Id.*¹ He attaches affidavits from other inmates and other documents supporting most of these contentions. Dkt. 53-1.²

Litigants in federal civil cases do not have a constitutional or statutory right to court-appointed counsel. *Walker v. Price*, 900 F.3d 933, 938 (7th Cir. 2018). Instead, 28 U.S.C. § 1915(e)(1) gives courts the authority to "request" counsel. *Mallard v. United States District Court*, 490 U.S. 296, 300 (1989). As a practical matter, there are not enough lawyers willing and qualified to accept a

¹ Mr. Ates also claims that the Educational Supervisor misrepresented the availability of criminal law reporters at FCC Terre Haute. Dkt. 53 at 5. Mr. Ates claims that, if criminal law reporters had been available there is a "very good chance" that they would have provided him with "pertinent, contemporaneous legal developments," but he fails to explain how criminal law reporters would have helped him with research in this civil case.

² Mr. Ates also asks the Court to impose sanctions, initiate civil and criminal contempt proceedings, and grant a motion for discovery related to the alleged contempt. Dkts. 56, 77, 78. Those motions are **denied**.

pro bono assignment in every *pro se* case. See *Olson v. Morgan*, 750 F.3d 708, 711 (7th Cir. 2014) ("Whether to recruit an attorney is a difficult decision: Almost everyone would benefit from having a lawyer, but there are too many indigent litigants and too few lawyers willing and able to volunteer for these cases.").

"When confronted with a request under § 1915(e)(1) for pro bono counsel, the district court is to make the following inquiries: (1) has the indigent plaintiff made a reasonable attempt to obtain counsel or been effectively precluded from doing so; and if so, (2) given the difficulty of the case, does the plaintiff appear competent to litigate it himself?" *Eagan v. Dempsey*, 987 F.3d 667, 682 (7th Cir. 2021) (quoting *Pruitt v. Mote*, 503 F.3d 647, 654 (7th Cir. 2007)). These two questions "must guide" the Court's determination whether to attempt to recruit counsel. *Id.* These questions require an individualized assessment of the plaintiff, the claims, and the stage of litigation. See *Pruitt*, 503 F.3d at 655-56. The Seventh Circuit has specifically declined to find a presumptive right to counsel in some categories of cases. *McCaa v Hamilton*, 893 F.3d 1027, 1037 (7th Cir. 2018) (Hamilton, J., concurring); *Walker*, 900 F.3d at 939.

The first question, whether litigants have made a reasonable attempt to secure private counsel on their own "is a mandatory, threshold inquiry that must be determined before moving to the second inquiry." *Eagan*, 987 F.3d at 682; see also *Thomas v. Anderson*, 912 F.3d 971, 978 (7th Cir. 2019) (because plaintiff did not show that he tried to obtain counsel on his own or that he was precluded from doing so, the judge's denial of these requests was not an abuse of discretion). Mr. Ates has attempted to contact multiple attorneys with requests

for representation without success. Dkts. 39-1 through 39-4. The Court finds that he has made a reasonable effort to recruit counsel on his own before seeking the Court's assistance.

"The second inquiry requires consideration of both the factual and legal complexity of the plaintiff's claims and the competence of the plaintiff to litigate those claims himself." *Eagan*, 987 F.3d at 682 (citing *Pruitt*, 503 F.3d at 655). "Specifically, courts should consider 'whether the difficulty of the case—factually and legally—exceeds the particular plaintiff's capacity as a layperson to coherently present it to the judge or jury himself.'" *Id.* (quoting *Pruitt*, 503 F.3d at 655). "This assessment of the plaintiff's apparent competence extends beyond the trial stage of proceedings; it must include 'the tasks that normally attend litigation: evidence gathering, preparing and responding to motions and other court filings, and trial.'" *Id.* (quoting *Pruitt*, 503 F.3d at 655).

Across his many filings, including his response to the United States' motion to dismiss, Mr. Ates has proven himself to be a capable *pro se* litigant, which would normally cut against appointing counsel to represent him—at least at this stage of the litigation. But Mr. Ates's case presents a unique confluence of factors, including novel and complex questions of law involving Indiana's COVID-19 Immunity Statute and the quarantine exception to the Federal Tort Claims Act, neither of which has been the subject of much litigation, see *dk. 43* (order on motion to dismiss), and Mr. Ates's unique problems with accessing state law research materials. Based on the specific circumstances presented by this case, Mr. Ates's motion for assistance with recruiting counsel, *dk. [39]*, is

granted to the following extent: The Court will attempt to recruit counsel to represent Mr. Ates. On or before **September 8, 2023**, Mr. Ates must complete and return the Court's form motion for assistance with recruiting counsel. If he fails to do so, the Court may cease its efforts to recruit counsel to represent him. The **clerk is directed** to include a copy of Motion for Assistance Recruiting Counsel form along with Mr. Ates's copy of this Order.

III. Motion to Withdraw Pending Motion as Moot

Mr. Ates has filed a motion to withdraw his motion to allow service via CM/ECF because the United States consented to the motion, thereby rendering it—in his opinion—moot. Dkt. 81. Mr. Ates's motion, dkt. [81], is **denied as unnecessary**. The Court already granted his motion to allow service via CM/ECF. *See* dkt. 75.

IV. Motion to Reset Deadlines

Mr. Ates has filed a motion asking the Court to extend the deadline for filing amended pleadings. Dkt. 85. The United States does not oppose the motion, so long as the deadline is not extended beyond July 27, 2023. Dkt. 88. Mr. Ates's motion, dkt. [85], is **granted** to the extent that all pending case deadlines are **suspended** while the Court attempts to recruit counsel to represent Mr. Ates. The Court will inform the parties when the recruitment process is complete.

V. Motion to Reconsider

Mr. Ates also filed a motion asking the Court to reconsider its decision to dismiss his claims for negligence per se. That motion, dkt. [52], is **denied**

without prejudice to being reasserted by counsel within 30 days after counsel's appointment, if counsel determines that renewing the motion is appropriate.

VI. Conclusion and Summary

In summary, Mr. Ates's motion for judicial notice, dkt. [80], is **granted in part and denied in part** for the reasons stated in Section I. Mr. Ates's motion for assistance with recruiting counsel, dkt. [39], is **granted** to the extent that the Court will attempt to recruit counsel to represent Mr. Ates. Mr. Ates must complete and return the enclosed blank form motion for assistance with recruiting counsel on or before **September 8, 2023**, or the Court may cease its efforts to recruit counsel to represent him. The motions for sanctions and to initiate contempt proceedings, dkts. [56] and [78], and the motion for discovery relates to those motions, dkt. [77], are **denied**. The motion to withdraw pending motion as moot, dkt. [81], is **denied as unnecessary**. The motion to reset deadlines, dkt. [85], is **granted** to the extent that all deadlines are **suspended** pending recruitment of counsel. The motion to reconsider, dkt. [52], is **denied without prejudice** to reassertion by counsel within 30 days after counsel is appointed, if counsel deems such a motion appropriate.

The **clerk is directed** to enclose a blank form motion for assistance with recruiting counsel with Mr. Ates's copy of this Order.

SO ORDERED.

Date: 8/21/2023



James Patrick Hanlon
United States District Judge
Southern District of Indiana

Distribution:

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